

February 22, 2008

Mr. Robert Gouge
1010 Sugartown Circle
Middletown, DE 19709

Mr. Chris Stefanadis
15 N. Cummings Drive
Middletown, DE 19709

**RE: Freedom of Information Act Complaint Against
Town of Middletown**

Dear Mr. Gouge and Mr. Stefanadis:

On January 24, 2008 the Delaware Department of Justice (DDOJ) received Mr. Gouge's letter dated January 22, 2008 alleging that the Town of Middletown (the "Town") violated the Freedom of Information Act (FOIA) regarding the payment of employee bonuses. On January 24, 2008 we sent that complaint to the Town and requested their response by February 4, 2008. We received Mr. Stefanadis's complaint about the same matter on January 30, 2008, and on January 31, 2008 we sent that complaint to the Town. We received the Town's response to both complaints on February 4, 2008. On February 13, 2008 we asked the Town to clarify certain facts concerning the payment of bonuses. We received their clarification on February 19, 2008.

Mr. Gouge's complaint has two components: first, the Town's failure to honor his "request for the methodology used to set the bonus payment;" second, failure of the

Town Council “to set the level of the bonus payments and authorize their disbursement” at a public meeting. Mr. Stefandis’s complaint is that the Town’s FY 2008 budget line item for “Employee Benefits – Other,” out of which the bonuses were paid, did not describe what those benefits were, and that the documents he received from the Town concerning the payment of bonuses were “not truthful.”

According to the Town’s response, the Mayor directed that employee bonuses be paid after consultation with the Town’s Financial Manager. The Town has asserted that it “does not have a written policy governing the amount of these bonuses and if and when these funds are given out.” The Town further states that Mr. Stefanadis did not comply with the Town’s formal FOIA request process. However, it did provide a response to Mr. Stefanadis’s informal request.

While FOIA defines “public record” broadly, it does not require that a public body *create* a record in order to respond to a FOIA records request. 29 *Del. C.* § 10002(g); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). The Town asserts that there are no records that describe how the bonuses are determined. Moreover, while Mr. Gouge has asked the Town to “describe the criteria used to determine which Middletown Town employees qualify for this payment/bonus...[or] describe the process used to determine the amount of this payment/bonus,” FOIA does not require a public body to answer questions in a written or spoken format. *Att’y. Gen. Op.* 00-IB08 (May 24, 2000). There are no existing documents that provide the information Mr. Gouge seeks, and he has no right under FOIA to anything other than existing documents. For the same reason, Mr. Stefanadis is not entitled under FOIA to a budget document that differs from the one adopted at the public meeting of the Town Council, because no such

document exists. Mr. Stefanadis's complaint that the records produced to him were "not truthful" does not implicate FOIA, which does not address the accuracy of public records.

Mr. Gouge also complains that, although the Town Council approves the budget at a public meeting, the bonuses are determined "behind closed doors." The Town claims that the Town Council approved the FY 2008 budget at an open meeting on July 2, 2007. Included in the budget was a sum for "Other Employee Benefits." According to the Town, the Mayor decided to pay employee bonuses out of that line item.

FOIA requires that meetings of a quorum of the members of a public body for the purpose of discussing or taking action on any matters over which "the public body has supervision, control, jurisdiction or advisory power" be open to the public. 29 *Del.C.* § 10002(e). 29 *Del.C.* § 10002(c) defines "public body" as including "any body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity...." Because 29 *Del.C.* § 10004(h)(6) states that the open meetings requirements do not apply to public bodies of one, it is not necessary to decide whether the Mayor is a public body: either the Mayor is not a public body or he is a public body of one. In either case, the Mayor's actions do not have to take place in an open meeting, and the Town has not violated FOIA's open meeting provisions.

Conclusion

For the reasons stated herein, it is determined that the Town of Middletown has not violated the Freedom of Information Act in responding to Mr. Gouge and Mr.

Stefanadis's records requests or in the manner in which it arrived at a decision to pay employee bonuses.

Very truly yours,

Judy Oken Hodas
Deputy Attorney General

APPROVED

Lawrence W. Lewis
State Solicitor

cc: Scott E. Chambers, Esquire